

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

ALTON RAYMOND AMES,	)	
	)	
Plaintiff,	)	
vs.	)	NO. CIV-06-0668-HE
	)	
ANDREA D. MILLER,	)	
	)	
Defendant.	)	

**ORDER**

Plaintiff Alton Raymond Ames, a state prisoner appearing *pro se*, instituted this §1983 action alleging that the defendant, his former attorney, violated his constitutional rights in conjunction with her representation of him in post-conviction proceedings. He also asserts state law claims based on her alleged malpractice. Consistent with 28 U.S.C. §636(b)(1)(B), the matter was referred for initial proceedings to Magistrate Judge Gary M. Purcell, who has recommended that the plaintiff's claims be dismissed, the federal claim with prejudice and the state claims without prejudice.

The magistrate judge concluded the plaintiff failed to state a § 1983 claim as he neither alleged nor presented any evidence showing that the defendant was acting under color of state law. He also determined that it would be futile to allow the plaintiff to amend his federal claim because "[p]rivate attorneys performing traditional legal functions as counsel do not act under color of state law." Supplemental Report and Recommendation, p. 3. Due to the dismissal of the sole federal claim, the magistrate judge recommended that the court

decline to exercise supplemental jurisdiction over the plaintiff's remaining state law claims.<sup>1</sup>

An objection has been filed by the plaintiff in which he asserts that the magistrate judge should have allowed him to withdraw his § 1983 claim and then go "forward with the remaining jurisdictions." Objection, p. 3. However, as the parties are not diverse, the federal claim is the only basis for this court's jurisdiction. The plaintiff even admits that the defendant was not a state actor, but then asserts that she "may have acted with state personnel over the plaintiff's case." *Id.* His conclusory allegations are insufficient to establish that the defendant acted under color of law.

The court has conducted a de novo review of the plaintiff's claims and agrees with Magistrate Purcell's analysis. The court adopts the Supplemental Report and Recommendation and dismisses with prejudice the plaintiff's § 1983 claim against the defendant. His state law claims are dismissed without prejudice to permit them to be pursued, if he elects, in state court.

**IT IS SO ORDERED.**

Dated this 7<sup>th</sup> day of Dec. 2006.

  
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JOE HEATON  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup>The magistrate judge also recommended that the complaint not be construed as a habeas petition.